(5) 'Capital net gain' means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains. . . .

(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property or a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which

the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112(g) of this title or under the provisions of section 203(c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

"SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property Acquired After February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition or property acquired after February 28, 1913, shall be the cost of such property; except that— . . .

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. . . ."

SUMMARY OF TAXPAYERS' ARGUMENT.

1. In the absence of clear language in the statute to the contrary, property must be deemed to have been "held by" a taxpayer at least from the time when he acquired it.

2. It was settled by *Brewster* v. *Gage*, 280 U. S. 327, that a residuary legatee "acquired" at the date of the decedent's death such of the decedent's securities as he received as a part of his distributive share of the estate.

3. The words "capital assets" in the capital net gain section of each of the prior Revenue Acts (the Acts of 1921, 1924, and 1926) were defined, as in the 1928 Act, as "property held by the taxpayer for more than two years."*

4. Under the uniform administrative construction of that section by the Revenue Department prior to the 1928 Act, property of a decedent received by a legatee-taxpayer was deemed to have been "held by the taxpayer" from the date of the decedent's death for the purpose of the definition of "capital assets" in the capital net gain section.

5. The reenactment of that definition of "capital assets" without change in the Revenue Act of 1928 must be held "to indicate Congressional approval of this administrative interpretation". (*Helvering* v. *Bliss*, 293 U. S. 144).

6. § 113 (a) (5) of the Revenue Act of 1928 (the section on which the Government relies in this case) mere-

* (The 1921 Act defined such assets as "property *acquired and* held by the taxpayer for more than two years, but it is obvious that the words "acquired and" were mere surplusage.)

ly fixes an arbitrary base date for the purpose of computing the *amount* of a taxpayer's gain or loss from the sale of property "acquired by will or intestacy", and its language is such as to make it clear that the arbitrary base date in the case of a residuary legatee of personal property is "the time of distribution" of such property to the taxpayer, rather than "the time of acquisition" of such property by the taxpayer as the corresponding section of the prior Revenue Acts had provided.

7. If Congress had intended by such section to establish it as the law that the date of distribution to the residuary legatee should be deemed to be his date of acquisition for the purpose of the entire Revenue Act, or even for the purpose of that section, it could easily have chosen apt words to make that intent clear. On the contrary, however, the words used by it in that section, when read in the light of the words used in the corresponding section of the prior Acts, tend to indicate that Congress were merely choosing the date of distribution rather than the date of acquisition as the arbitrary base date for the purpose of that one section.

8. There was nothing new in fixing an arbitrary date rather than the taxpayer's acquisition date as the base date to be used in computing gain or loss (see subdivisions (1), (2), (3), (4), and (6) of § 113 (2) of the 1928 Act and the corresponding sections of the prior Acts).

9. Nothing in the case of *Helvering* v. *New York Trust Company*, 292 U. S. 455, supports the Government's contention in the case at bar, for in that case the question was one of adding another's tenure to the

taxpayer's tenure,—something which is consistent with the cardinal principle that taxing acts should be construed in favor of the taxpayer,—whereas in the case at bar, the question is whether the taxpayer's tenure for the purpose of the capital net gain section is to be cut down to something less than the plain language of that section calls for—something which would be inconsistent with that cardinal principle.

10. *Helvering* v. *Bliss,* 293 U. S. 144, rather than *Helvering* v. *New York Trust Company,* 292 U. S. 455, is controlling in the case at bar, for in the *Bliss* case, as in the case at bar, the question was whether the amendment of one section of the Revenue Act should be construed as having the effect of changing the meaning, as theretofore established by a uniform administrative construction, of another section of that Act which had been reenacted without change, whereas in the *New York Trust Company* case the question was whether an amendment of the very section, the construction of which was the issue involved in that case, operated to change the meaning of that section or merely to declare its meaning. In the case at bar we have no such issue as that in the *New York Trust Company* case.

ARGUMENT.

I.

It should be axiomatic and need no argument that a person holds property at least from the time he acquires it. Therefore the next question is,—when does a residuary legatee "acquire" property of the decedent that comes to him as such residuary legatee?

II.

This proposition was settled by *Brewster* v. *Gage*, 280 U. S. 327. The question involved in that case was whether, in calculating the amount of gain realized or loss sustained by a legatee upon the sale by him of securities which had been a part of the decedent's property at his death, the legatee's cost basis should be the value of those securities at the date of the death or their value at the date of the decree of distribution. The sales were made in 1920, 1921 and 1922, and Acts involved were the 1918 and 1921 Acts. The governing provision of the 1918 Act was as follows:

> "Section 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof; . . ."

The governing provision of the 1921 Act was as follows:

"Section 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition . . ."

It thus appears that this Court (and it so stated at page 333 in its opinion), was construing the word "acquired" in the 1918 Act and the phrase "at the time of such acquisition" in the 1921 Act as to property of a decedent received by a general legatee. There were no other words or phrases in either Act which qualified the terms in question, and therefore the only question before the Court was the single one,—when, as a matter of general law, does a residuary legatee "acquire" the decedent's property?

This Court held that the legatee "acquired" such property at the death of the testator. He "acquired" it then because there then vested in him "the right" to so much of that property as shall remain after proper administration and "the right" to have it delivered upon entry of the decree of distribution. Although the legal title to it vests in the executors as of the death, "it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the

death." The legatees' right to have this property "vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property."

This Court's decision was consistent with the Massachusetts law as shown by the following excerpts from Massachusetts cases.

> "All the personal property of a testator vests in his executor by the probate of the will. It is sometimes said that an executor holds as trustee for the legatees. But all that is meant by that is that he holds title to his testator's goods in *autre droit* (*Weeks* v. *Gibbs*, 9 Mass. 74, 75, 76), and not in his own right. The right of those for whom he holds is a legal not on equitable right, and is enforced by an action at law." *Lathrop* v. *Merrill*, 207 Mass. 6, 10.
>
> "The right to a distributive share is a vested interest, and although the settlement of the estate be delayed, and a decree of distribution postponed, yet the decree of distribution, when made, relates back to the time of the decease of the intestate, and apportions the estate to the persons then entitled, or their representatives." Shaw, C. J., in *Davis* v. *Newton*, 6 Met. 537, at 541.

III–IV.

Let us look at the situation that confronted Congress when it enacted the 1928 Act. The capital net gain section had been in the prior Revenue Acts of 1921, 1924 and 1926. The definition of "capital assets" in that section as being "property held by the taxpayer for more than two years" had remained unchanged in that

respect. There had been amendments of that section by which there had been added to the period during which the taxpayer had held the property sold, certainly additional periods such as the period during which the taxpayer had held other property into which the property in question had been converted or for which it had been exchanged, and such as the periods during which certain other persons such as donors had held the property.

The uniform administrative construction of that definition as applied to general and residuary legatees had been that they *"held"* from the time of the decedent's death such of the decedent's property as they received in distribution of the estate.

I. T. 1719 issued in October 1923 (C. B. II-2, 45).

Letter of Commissioner to Prentice Hall, Inc. of December 7, 1923 (P-H. Tax Serv. 1923, pages 2703-4).

I. T. 1889 issued in January 1924 (C. B. III-1, 70).

In I. T. 1889 (which, by the way, has never been revoked or modified by the Revenue Department) the Revenue Department ruled that where a general legatee sold in 1922 certain securities, formerly owned by the testator who had died in 1919, which the legatee had received in 1921 as a part of his distributive share of the estate, such legatee had acquired such property at the date of the testator's death and that he therefore had "held the property for more than two years" under the provisions of the capital net gain section (s. 206) of the Revenue Act of 1921. This conclusion was

reached *not* because that happened to be the base date for computing the amount of the taxpayer's gain *but primarily because* that was the date when, in the opinion of the Revenue Department (which was later confirmed by the *Brewster* case), the taxpayer, as a matter of general law, had *acquired* the property.

Another reason given in I. T. 1889 for this conclusion was there stated as follows:

> "That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining 'capital assets' is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:
>
> [The quotation of this subdivision is omitted because it appears in the full text of this I. T. in the appendix of this brief.]

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. *If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned.* Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co.* v. *Riordan,* 280 Fed. 624, 626), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but

that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has in interest vesting at the decedent's death analogous to that of a cestui que trust; section 206(c) expressly grants to a cestui the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege." (Italics ours.)

The significance of the foregoing reason is that the subdivision (c) of section 206 of the 1921 Act there referred to now appears, with no material change, as Section 168 of the 1928 Act.*

V.

In the face of that uniform administrative construction of the capital net gain section, which had continued openly and publicly for about five years, Congress reenacted the definition of "capital assets" without any material change whatsoever. This reenactment of that section under such circumstances must be held "to indicate Congressional approval of this administrative interpretation."

Helvering v. *Bliss*, 293 U. S. 144.

(It is to be noted that the only rulings which had been made to evidence such uniform administrative construction in that case were a telegram published in a tax service, an I. T. and a Mim.)

Furthermore it is to be noted that, although Congress

* (The only change, which change first appeared in the 1924 Act, was that the words at the beginning of the paragraph, "In the case of a partnership or of an estate or trust", were changed to read, "In the case of the members of a partnership, of an estate or trust, or of the beneficiary of an estate or trust, . . ."

had previously deemed it necessary to insert specific provisions in the capital net gain section providing for addition of tenures to the taxpayer's own tenure where he was required to use an earlier date as his base date for the purpose of computing the amount of his gain or loss (see subdivisions (A), (B) and (C) of Section 101 (c) (8) of the 1928 Act, and the corresponding provisions in the 1926 Act), nevertheless Congress made no change in the capital net gain section in the 1928 Act as to a general or residuary legatee to indicate that Congress intended to require that such legatee be deemed to hold his property for the purpose of the capital net gain section (§101) only from the date it was distributed to him (his new arbitrary base date for the purpose of computing the amount of his gain), rather than the date when, under the prior uniform administrative construction of §101, he acquired it.

VI–VII.

Even though Congress in the cost basis section (Section 113 (a) (5) of the 1928 Act) changed the base date as to general legatees, there is nothing to indicate that it intended to declare that such new base date should be deemed, for the purposes of the Act, to be the legatee's acquisition date. On the contrary, it seems clear that it intended to fix an arbitrary base date which it recognized was not the same as the acquisition date.

1. The very fact that Congress used the phrase "time of *distribution* to the taxpayer" in the same sentence, and in connection with, the phrase "acquired either by will or by intestacy," particularly when considered in the light of the language of the corresponding cost basis provision in the prior Acts, indicates clearly that Con-

gress purposely used the phrase "time of distribution" in contradistinction to the phrase "time of acquisition".

2. In the case of specific bequests of personal property, it fixed the base date as "the time of the death of the decedent," and yet the situation as to legal title is exactly the same here as in the case of a general or residuary bequest. In each case the legal title during the period of administration is in the executor, although in *autre droit,* for benefit of the legatee.

3. If Congress had intended that for the purposes of the Act *generally* such a legatee or distributee should be deemed to have "acquired" such property at the time of its distribution to him rather than at the date of death, it could not have so provided in simple terms and made such intent unmistakably clear. Indeed, it behooved Congress to make such intention plain by the use of appropriate language, in view of the uniform administrative practice of the Department in treating a legatee as having "held" property of the decedent from the date of the death for the purpose of the capital gain section.

There was nothing new in fixing an arbitrary date rather than the taxpayer's acquisition date as the base date to be used in computing gain or loss. In subdivisions (1), (2), (3), (4) and (6) of section 113 (a) of the 1928 Act, and in the corresponding provisions of the prior Acts, such arbitrary dates were fixed as March 1, 1913, the donor's acquisition date in a case where the donee's gain or loss was to be computed, the date when the taxpayer acquired other property into which the property sold by the taxpayer had been converted or for which it had been exchanged, and other arbitrary dates.

IX–X.

The Government, in its Brief, places great reliance upon the case of *Helvering* v. *New York Trust Company*, 292 U. S. 455. We submit, however, that such reliance is based upon a misconception of the holding and import of that case.

The question there involved was whether Congress, in amending the capital net gain section by adding by the 1926 Act to the definition of "capital assets" the sentences which now appear as subdivisions (A), (B), and (C) of section 101(c) (8) of the 1928 Act, thereby changed or merely declared the meaning of that definition. The specific question was whether a donee was entitled under the 1921 Act to the benefit of the capital gain section of that Act simply because he was required by the cost basis section of that Act to use his donor's acquisition date as his own base date for the purpose of computing the amount of his gain or loss, and this Court (three Justices dissenting) held that he was so entitled.

An examination of the opinion will disclose that apparently the principal reasons for this conclusion on the part of the majority of this Court were that the legislative purpose to be served by the application of the lower rate upon capital gains was directly opposed to the Commissioner's construction; that a donee taxpayer who was required to take his donor's base date for the purpose of computing the amount of his gain would be discriminated against if he could not also use that donor's base date for the purpose of bringing himself within the benefit of the capital net gain sec-

tion; and that it was to be inferred that Congress did not intend penalization of that sort.

No such situation exists in the case at bar. The legatee's base date for computing the amount of his gain is arbitrarily fixed at a date later than his acquisition date. He is claiming that it is not to be inferred that he is thereby to be deprived of the benefit of the capital net gain section in the absence of plain language to that effect. We do not have a situation in the case at bar where, unless the change in base date is to be inferred to change the taxpayer's acquisition date, he will be discriminated against or penalized.

It is a well recognized canon of statutory construction that taxing acts are not to be extended by implication beyond the clear import of the language used where such implication would be against the interests of the taxpayer. In taxing statutes "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail". "Unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify law by construction."

Crooks v. *Harrelson,* 282 U. S. 55.
See also *United States* v. *Merriam,* 263 U. S. 179, 187–8.

By the plain language of the capital net gain section the taxpayers in the case at bar come within that section, having "held the property for more than two

years". As said by this Court in *Old Colony Railroad* v. *Commissioner*, 284 U. S. 552, at 560:

> "The legislature must be presumed to use words in their known and ordinary signification. The popular or received import of words furnishes the general rule for interpretation of public laws . . . This rule is applied to taxing acts."

In ordinary parlance a person holds something from the time he acquires it; and it is a principle of general law, as settled by the *Brewster* case, that a residuary legatee acquires the decedent's property at the death of the decedent.

The situation in the case at bar is, therefore, just the opposite from the one in the *New York Trust Company* case. In the case at bar the taxpayers come clearly within the plain language of the capital net gain section, and the Government is claiming that, because of an amendment to another section, it is to be inferred that Congress intended to take the taxpayers out of the capital net gain section and make them taxable under a different section which imposes a greater tax burden.

In the *New York Trust Company* case the taxpayer could not bring himself within the plain language of the capital net gain section, but claimed that it was to be inferred that he could do so because of the provisions of another section. He so claimed because Congress, by a later amendment of the capital gain section, had made it clearly include taxpayers in the same situation as he had been, and also because without such an inference he was being discriminated against and penalized.

Obviously, therefore, the situations in the two cases

are radically different. Certainly there is nothing in the *New York Trust Company* case to indicate that a taxpayer is to be subjected, merely by inference, to a greater tax burden, particularly where there has been no subsequent amendment of the capital net gain section which could be held declaratory to the effect that such an inference should be drawn.

AS TO SOME OF THE ARGUMENTS IN THE GOVERNMENT'S BRIEF.

(As the Government's brief in the McFeely case, the argument in which it is adopting in the case at bar, was only received by the taxpayer's attorney about noon of October 17, and the taxpayer's brief had to go to the printer by the morning of October 18, obviously there has not been sufficient time to deal fully with the Government's arguments, and it is not to be inferred that the arguments or statements in that brief which are not answered are to be considered as acquiesced in or admitted by the taxpayers.)

It is perfectly true as pointed out in the Government's brief (Br. 24–25), that the *Brewster* case "must be read in the light of the facts presented and the statutes involved." The Court was there concerned with the base date for determining gain or loss on property sold by a residuary legatee. The Government's argument as to the effect of that case, however, loses sight of the fact that in order to determine that base date it necessarily had to settle the question as to when, as a matter of general law, the residuary legatee "acquired" such property, for the language of the statute merely pro-

vided that the base date of a legatee should be his date "of acquisition",—the date when he "acquired" it.

The Government's brief then proceeds with its argument on the theory that, if the statute had established value at the time of distribution as the basis of calculation in respect of sales by a legatee, this Court would have held that such date was the date when the legatee "acquired" the property, or that such date was his date "of acquisition". Such a line of argument is obviously fallacious.

Similarly, the argument of the Government based upon the last paragraph of the opinion in the *Brewster* case (quoted by the Government at Br. 26) gives an erroneous effect to that paragraph and leads the Government to the erroneous conclusion (Br. 27) that the *Brewster* case directly supports the Government's position. The paragraph does nothing more than merely point out that Congress, by § 113 (a) (5) of the Revenue Act of 1928, merely changed the law as to the base date to be used in determining the amount of gain or loss in the case of residuary and general legatees. There is nothing whatsoever in that paragraph to indicate that the 1928 Act changed the law as to the date of acquisition in the case of a residuary legatee. On the contrary, a reading of that paragraph in the light of the rest of the opinion indicates that the "change of law" intended was a change of law as to the base date to be used, changing that date from the date of acquisition to the date of distribution, and not a change in law as to a residuary legatee's date of acquisition.

Again, at page 15, the Government says:

> "Under the earlier statutes confusion arose as to the meaning of the general language, 'date of acquisition,' employed in fixing the basis of property acquired by a decedent by general and residuary legatees. It was to settle this confusion that Congress in the 1928 Act, adopted prior to the decision in *Brewster* v. *Gage, supra,* specifically fixed, without regard for technical rules as to the vesting of titles, the dates of acquisition for income tax purposes of property acquired from a decedent in various ways. Section 113 (a) (5), *infra,* in fixing the date of distribution as the basis of property acquired from a decedent by will, other than specific bequests, and by intestacy, plainly establishes that date as the time of acquisition of the property for income tax purposes."

There is no warrant in the language of that section of the 1928 Act for such a conclusion that Congress was fixing such a legatee's "date of acquisition" or "time of acquisition". It purported to do nothing more than many of the other parts of section 113 did, *i. e.,* to fix an arbitrary date which had no relation to the taxpayer's acquisition date, as the base date to be used in determining the amount of the taxpayer's gain or loss: as to property acquired by a taxpayer before March 1, 1913, the base date was fixed as March 1, 1913; as to property acquired by a taxpayer by gift the donor's acquisition date was to be used in certain instances; and so on.

The same fallacious position was taken at Br. 16 where it says:

> "The statute having prescribed what shall be

deemed the date of acquisition of personal property by a residuary or general legatee . . ."

CONCLUSION.

Wherefore, the taxpayers respectfully submit that they are entitled to have their gain taxed under the capital net gain section rather as ordinary income subject to the normal and surtaxes. They are so entitled under the ordinary meaning of the plain language of that section as established by the uniform administrative construction of that language for at least five years prior to the reenactment of that same language without change in the 1928 Act. (*Helvering* v. *Bliss, supra.*) They are not to be deprived of that right solely because a separate section which dealt solely with the method of computing the amount of the gain was amended so as to fix an arbitrary base date which was different from the taxpayer's acquisition date.

It is one thing for the Court to liberally construe a tax provision, which was enacted for the benefit of taxpayers, so as to permit a taxpayer who did not come within its literal terms to have the benefit of it. It is quite a different proposition for a Court to so construe such a tax provision as to deny the benefit of that provision to a taxpayer who can bring himself within its literal terms, where the only reason which can be advanced for depriving him of that benefit is that Congress changed another tax provision, especially where the taxpayer's right to the benefit of the first tax provision had theretofore been in no way dependent upon the provision now changed.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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October, 1935.

APPENDIX.

(The following is the full text of I. T. 1889 (III C. B.-1, pp. 70–72) as it appeared in the Internal Revenue Bulletin published by the Treasury Department, Bureau of Internal Revenue.)

REVENUE ACT OF 1921.

"In the case of a taxpayer who received property under the terms of a will, the two-year period during which the assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 runs from the date of the testator's death."

Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.

The particular question raised is whether the two-year period during which capital assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.

The question requires a determination of the meaning of that part of section 206(a) 6, which provides:

"The term 'capital assets' as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years. . . ."

It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the decedent's death. Mr. Jusice Holmes thus states the rule in *Hooper* v. *Bradford* (1901) (178 Mass., 95, 97):

> "The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust,* and vests at the death of the testator."

To the same effect is *Mechanics' Savings Bank* v. *White* (1889) (150 Mass. 234). The rule is the same in the case of intestacy, according to *Perryman* v. *Green* (1863, (39 Ala., 133):

> "The right of a distributee attaches upon the death of the intestate. The interest then accrues, and the subsequent division serves to ascertain and define, convert into a legal right, and reduce to possession, an equity which existed before in the form of a *chose* in *action,* cognizable in chancery."

In an article in 21 Harvard Law Review, 436, the result of the authorities is thus summarized:

> ". . . Neither an executor nor an administrator takes any beneficial interest in the decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que trust.*"

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires it at the date of the

decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.)

Granted, then, that a distributee acquires an immediate interest in the decedent's estate at the date of the decedent's death, and that this interest is analogous to that of a *cestui que trust,* is this interest "property acquired and held by the taxpayer" from the time of the death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms "acquired and held" in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:

> "In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section."

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section

206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase "property acquired and held by the taxpayer" in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions rather than merely one (*Monroe Co.* v. *Riordan* (1922) (280 Fed., 624, 626)), it appears that Congress did not intend the words "property acquired and held by the taxpayer" to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra,* a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que trust;* section 206(c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege.

Further, in view of the express purpose for enacting the section, it is very unlikely that Congress intended to distinguish between legal and beneficial interests in its application. It is well known that section 206 was adopted to provide relief for taxpayers who realize in a single year a gain accumulated over several years (see notes on the Revenue Act of 1918, pp. 15–16; report from Committee on Ways and Means, dated August 16, 1921; p. 10; report from Finance Committee, dated September 26, 1921, p. 12). The reason for the enactment is directly applicable to the instant case. The property

in question was acquired by the taxpayer under the regulations at the date of the testator's death; the gain resulting from its sale is one accumulated over more than two years, during all of which time it has been retained for the taxpayer. The fact that during part of that period an executor or administrator was in possession of the property should not affect the result, since the taxpayer acquired the property at the testator's death, and thereafter the beneficial ownership was in him.

Moreover, the Department has adopted the view, both in the regulations and in its rulings, that the phrase "acquired and held by the taxpayer" does not require actual possession of the assets in all cases. Article 1651 of Regulations 62 provides in part:

> ". . . The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property and no gain or loss recognized under the provisions of section 202, the prescribed period applies to the property exchanged and the property received in exchange considered as a unit. . . ."

In neither of these cases would the taxpayer have had possession during the two-year period of the specific property disposed of, although the identity of the particular investment during that time would be sufficiently established. In I. T. 1660 (C. B. II-1, 36), in which the exact question herein has been considered by the Unit, it has been held that the two-year period provided in

section 206(a) 6 begins to run on the date of the decedent's death.

Finally, as stated above, it is well settled that for the purpose of computing gain or loss from the sale by the beneficiary of property acquired by bequest, devise, or inheritance, the property is acquired by the beneficiary as of the date of the decedent's death. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.) Hence, in the instant case, the taxpayer acquires the securities at the date of the decedent's death; and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years. The gain thereby realized represents an accumulation over a period of more than two years. In view of the indications within the section itself that a taxpayer possessing a beneficial interest in property may have the benefit of its provisions, and of the construction placed upon the section by the regulations and rulings, it is held that the taxpayer herein is entitled to compute his tax with reference to the gain on the sale of the securities here in question on the basis provided in section 206.